Supreme Court, U.S.
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No. 03-174

In The
Supreme Court of the United States

JOHN DOE and JANE DOE, individually and on behalf of their minor children, D.M., N.O., and B.O.,

Petitioners,

v.

JERRY REIGER and DON DIXON, in their official capacities, and DEBORAH O'BRIEN, in her individual capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether both courts below correctly found that the actions of a State of Florida, Child Protective Services worker did not violate either the Fourth or Fourteenth Amendment due process rights of the Does even though she had not gotten a prior court order because of her belief that she had sufficient probable cause to remove the children for their safety and obtain a court hearing the following morning.

2. Whether both courts below correctly determined that the post deprivation hearing provided by Florida meets the requirements of the due process clause of the U.S. Constitution.

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STATEMENT OF THE CASE

The facts of the case underlying the Petition for Certiorari are as follows:

Plaintiffs filed an action for injunction, declaratory relief and damages pursuant to 42 U.S.C. § 1983 challenging Florida's statutory procedure whereby children may be removed from the custody of their parents prior to a court order where there is a reasonable belief a child has been abused or is in imminent danger of harm or illness or injury as a result of abuse. *See* Fla. Stat. 39.401 (1999). Both the trial court and the 11th Circuit Court of Appeals determined Florida's procedure did not violate the Constitution and that the Respondent, Deborah O'Brien, a protective service investigator for the Florida Department of Children and Families, hereinafter referred to as "O'Brien," had not applied the statute in an unconstitutional manner when she decided to temporarily remove the minor Petitioners from the custody of their parents, Jane and John Doe, under her belief they were in danger of harm from sexual abuse.[1] Additionally the trial court concluded from the evidence that O'Brien, who had consulted with legal counsel regarding the facts known to her, was justified in believing that probable cause and emergency circumstances existed to justify removal without prior court approval as authorized by Fla. Stat. § 39.401(1) (1999). *See* Petitioners' App. at 37.

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[1] It should be noted that the removal was merely placing the children with their grandparents for the evening pending a hearing the following morning before the juvenile court judge for a determination of whether there were sufficient facts to withstand a dependency action.

The State of Florida, Department of Children and Families, hereinafter referred to as "DCF," had received an abuse hot line referral on January 18, 2000, requiring an investigation into a report of sexual abuse made against John Doe by his nine (9) year old deaf niece. The niece had alleged that John Doe had caused her to touch his penis with her hands and perform oral sex on her. It was unclear as to the exact date when these acts occurred. While this investigation was ongoing, it was determined that John was possibly residing in a home with three (3) other minor children and he was residing in a different county. Hence, the matter was referred to Hillsborough County (Tampa) and in particular to O'Brien for further investigation.

O'Brien received the referral at 12:30 or 1:00 PM on January 21, 2000. The report forwarded to O'Brien referring to the Doe home stated: "There is concern that the children in this home could be at risk. Dad has a history of molesting other children in the past."

O'Brien began to gather background information, including a review of a report generated by the Florida Department of Law Enforcement, hereinafter referred to as "FDLE." While reviewing the FDLE report, O'Brien saw that John Doe had previously been convicted of lewd and lascivious behavior and rape. The FDLE report further indicated John Doe had been charged with two counts of child fondling.[2] In addition, John Doe's criminal record

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[2] Subsequent to the removal and return of the minor Doe children, it was discovered FDLE had erroneously reported the child/fondling charge and that this charge was actually the lewd and lascivious charge and arose out of John Doe's having exposed himself at a school bus stop area where there were minor children.

showed that he had a charge for solicitation of prostitution.

More importantly, O'Brien discovered there was another sexual abuse report contained in the Department of Children and Families files which referred to a 1995 incident between John Doe and a three (3) year old boy alleging that John Doe had placed his penis in the rectum of this child who was a non-relative whom the Doe's were babysitting. The Department's records contained information that it was believed the abuse had occurred but due to a lack of cooperation by the child's parents no charges could be filed.

O'Brien having this knowledge sought the advise of her supervisor with regard to how she should proceed. The supervisor advised O'Brien that the situation, as they understood the facts, merited protecting the minor Doe children by removing them and placing them in a safe residence until a court could decide whether the facts warranted a dependency action.[3] However, even though the supervisor believed O' Brien had probable cause, she required O'Brien to meet with legal counsel in this regard. O'Brien did then meet with an Assistant State of Florida Attorney General. The Assistant Attorney General advised O'Brien she believed there existed a basis for the removal of the children.

After her meeting with the Assistant Attorney General, O'Brien proceeded to further investigate the matter by going into the field to assess the situation, to meet the

[3] Under Florida's procedure this meant within 24 hours. Fla. Stat. 39.401(3).

Petitioners and make her final decisions. She met with the eldest child and secured her at her office pending her decision and then she proceeded to the Doe home to interview the adults and the remaining minors. O'Brien interviewed N.O. and B.O., who could not tell her the difference between good touch and bad touch and she interviewed Jane and John Doe. Based upon the facts as she understood them concerning the past actions of John and based upon her interviews, O'Brien determined that the children were at risk due to the escalating pattern of sexual abuse allegations against John Doe and her perceived belief that Jane Doe would not adequately protect the children pending the court hearing the following morning. O'Brien therefore advised the Does that she wanted the children to be in the custody of someone other than them for the evening and it was arranged that the minor children would stay overnight with their grandparents.

The following morning the juvenile judge decided to release the minor Plaintiffs back to their parents and the instant case was filed approximately 7 days thereafter.

At trial, O'Brien testified she still had an open mind when she went to the Doe home with regard to whether she would actually remove the children. However, the interview with the family, coupled with her understanding that John Doe's pattern of sexual behavior was progressing from strangers to relatives, she had concern that this pattern of sexual deviance meant these minor Doe children were in danger of harm and she became very concerned about their safety especially since they did not know good touch from bad touch. In addition, she was concerned about Jane's attitude, so then and only then, did she decide it was in the best interest of the children to

have them removed because they were, she believed, in imminent danger of injury or illness arising from abuse.

At trial, the Does also tried to support their theory of recovery by virtue of an unlawful entry into their home by O'Brien by claiming she did not have permission to enter into the home and yet did so in violation of their Fourth and Fourteenth Amendment rights. However, they were unsuccessful in doing so since the evidence produced did not support their theory because they could not say that they had not given implied permission for the entry into their home.

Having heard all of the testimony, the trial court granted a directed verdict in favor of O'Brien and subsequently ruled Fla. Stat § 39.401 (1999) was facially constitutional and was constitutionally applied in this case. (Petitioner's App. 36-38)

The Appellants timely appealed. The 11th Circuit Court of Appeals affirmed the decision earlier this year. *Doe v. Kearney*[4], 329 F.3d 1286 (11th Cir. 2003). Petitioners now ask this Court to exercise its discretionary authority to accept certiorari in this case because they claim there is a split in the Circuits regarding when it is appropriate to remove children without a prior court order and because the state laws divide over when such removal is appropriate.

[4] Kearney has been succeeded by Jerry Regier and hence he has been substituted herein.

SUMMARY OF ARGUMENT

The Court should not grant Petitioners certiorari in this case because the Petitioners are in error as to the status of the law vis-a-vis a split in the circuits, nor should they grant the same because of the varying state laws. The conflict at best among the Circuits arises from the varying circumstances of the cases which does not equate to a substantial conflict of law meriting this Court's intervention.

ARGUMENT

Petitioners ask this Court to exercise its discretionary power to accept their request for certiorari because they believe there is a substantial split among the Circuits concerning procedural due process vis-a-vis a case worker's obligations before the removal of a child from the parents' custody without prior court approval is lawful. In particular, Petitioners contend that the decision herein by the 11th Circuit and a decision of the 1st Circuit in the case of *Tower v. Leslie-Brown,* 326 F.3d 290 (1st Cir. 2003) are in substantial conflict with the decision of the 2nd Circuit in the case of *Tenebaum v. Williams,* 193 F.3d 581 (2nd Cir. 1999), the 9th Circuit in the case of *Mabe v. San Bernardino County Department of Public Social Services,* 237 F.3d 1101 (9th Cir. 2001) and the 10th Circuit in the case of *Roska v. Peterson,* 328 F.3d 1230 (10th Cir. 2003). Respondents would respectfully submit there is no substantial conflict and that there is no need for any decision to be rendered by this Court on this issue since the law has been and is clear as to when a child may be lawfully removed. Petitioners' theory is that a case worker must not only perceive that there is sufficient probable cause to

believe that a child is in danger warranting a removal first and then a hearing but that the worker must also ascertain whether there is insufficient time to obtain judicial permission. Petitioners believe that the decisions of the 2nd, 9th and 10th Circuits support their conclusion while the decision of the 11th Circuit and 1st Circuits do not. It is respectfully submitted that the position of the Petitioners is misplaced.

In *Tenebaum*, supra., the facts are so materially dissimilar that it is not persuasive at all. There a child was removed from her kindergarten class on January 9, 1990 and taken to the hospital in order to allow a gynecologist to examine her for possible sexual abuse. This was more than a day after the decision to do so was made and days after the worker had been at the home to assess the situation and allowed the child to remain in the home, which is contrary to what occurred in the instant case. The Court said at page 591 that the decision to proceed on an emergency basis rather than to seek parental consent or a court order was not aberrational. Under the Fourth Amendment, the 2nd Circuit held that if the worker believed the child was subject to the danger of abuse if not removed before authorization could be obtained then the removal complied with Fourth Amendment requirements despite the absence of prior court order. The seizure under an exigent circumstance would be justified. The 11th Circuit held likewise. The only disagreement between the two Circuits is with regard to what due process demands under the specific circumstances as before that Court at that time. The 11th Circuit recognized that due process is a flexible concept and such an inflexible rule as set forth by the 2nd would produce an onerous burden upon a case worker who must not only then assess the danger to the child but then must try to assess the court's schedule to

see if there was time to obtain a warrant. The 11th Circuit rather recognized that due process is a flexible concept and what procedures are required by due process require a determination under the circumstances of each case as versus a blanket determination as this Court had said in *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). The 11th Circuit found that only the 2nd Circuit had required a worker to also perceive that there was sufficient time to obtain a warrant and that the decision was a two to two panel decision. Having looked at the said case, the 11th Circuit noted the factual distinctions and in particular the fact that in *Tenebaum*, supra., the workers had admitted they were motivated not in the protection of the child but for the purpose of ruling out the possibility of the abuse and the unexplained day-long time period between the decision to remove and the removal whereas in the instant case the worker believed she needed to protect the children from what she believed to be imminent danger of abuse. The conflict was, therefore, not in what the Constitution requires but in the circumstances of the two cases upon which each court had to determine what process was due.[5]

In *Mabe*, the 9th Circuit found issues of fact precluding summary judgment as to whether there was reasonable cause to believe there was imminent danger of serious bodily harm to justify the warrantless entry into the home and the seizure of the child. In *Roska,* supra., the Court

[5] On a brief note, the *Tower* case supra., likewise found emergency circumstances justified the removal without prior court order and again there was evidence by the children themselves that was believed to be sufficient to justify their removal for their protection. There was no fact finding process utilized as in *Tenebaum.*

was analyzing qualified immunity and concluded that there was no evidence that could lead a case worker to believe exigent circumstances existed. The analysis was one of facts not law and this would not be sufficient to warrant the necessity of this Court's intervention since there is really no conflict among the jurisdictions.

All of Petitioners' cases have one common thread, which is that a child may be removed first with a court hearing to follow when the worker perceives the child is in danger and that the worker believes he is protecting the child by the removal. This is the law in each of the Circuits. There is no substantial conflict, therefore, as Petitioners have submitted. What there is a conflict over is the ultimate facts and those are subject to the clearly erroneous rule and their review would be of no importance save the litigants themselves. Therefore this Court should not accept the petition. *See Rudolph v. U.S.*, 370 U.S. 269 (1962).

Petitioners also argue that this Honorable Court should accept certiorari because there are a number of states who are divided with regard to whether removals in the absence of exigent circumstances are appropriate. Most respectfully this should not be a basis for this Court to accept certiorari.

Petitioners further and finally contend that Florida does not require exigent circumstances. The Petitioners are in error in this regard. Florida clearly requires exigent circumstances. Fla. Stat. 39.401 (1999) Therefore it is not necessary for this Court to make any pronouncement thereon.

CONCLUSION

It is respectfully submitted that this Honorable Court should not accept jurisdiction in this case as it does not merit the exercise of the Court's discretionary powers. There is no substantial conflict among the Circuits with regard to what process is due before a child may be removed from his or her parents' custody and the fact that each state has chosen a different path with regard to the procedures it seeks to use to meet the constitutional requirement of due process does not merit the attention of the Court at this time. Therefore, the Petition for Certiorari should be denied.

Respectfully submitted,

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